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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Procedures for Reviewing Requests for  
Relief From State and Local Regulations  
Pursuant to Section 332(c)(7)(B)(v) of the  
Communications Act of 1934

WT Docket No. 97-192

**COMMENTS OF SOUTHWESTERN BELL MOBILE SYSTEMS, INC.,**  
**SOUTHWESTERN BELL WIRELESS, INC., AND**  
**PACIFIC BELL MOBILE SERVICES**

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## SUMMARY

The Communications Act is explicit that to the extent that licensees comply with the Commission's regulations with respect to RF emission guidelines, state and local governments cannot regulation the placement, construction and modification of wireless service facilities on the basis of the environmental effects of RF emissions. In its Notice of Proposed Rulemaking, the Commission seeks comments on proposed procedures for filing and reviewing requests filed pursuant to Section 332(c)(7)(B)(iv)-(v) of the Communications Act for relief from state and local regulations on the placement, construction, or modification of personal wireless facilities based either directly or indirectly on the environmental effects of RF emissions. Southwestern Bell Mobile Systems, Inc. Southwestern Bell Wireless, Inc., and Pacific Bell Mobile Services (Collectively referred to as "SBMS") generally support the Commission's proposals.

The speedy resolution of siting disputes is critical to the deployment of personal wireless services. In resolving these disputes, the providers of personal wireless services should not be unduly burdened with submitting information to the local and state jurisdictions to demonstrate that they are in compliance with the Commission's regulations regarding RF emissions. The Commission's proposal regarding the type of information that local and state governments can request is reasonable.

It is also reasonable for the Commission to presume that licensees are in compliance with its RF emission guidelines and to place the burden to rebut that presumption on the local and state jurisdictions.

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**I. INTRODUCTION.**

Southwestern Bell Mobile Systems, Inc., Southwestern Bell Wireless Inc., and Pacific Bell Mobile Services (Collectively referred to as "SBMS") hereby file comments in response to the Notice of Proposed Rulemaking ("NPRM")<sup>1</sup> released on August 25, 1997 in the above-captioned proceeding. In the NPRM, the Commission seeks comment on proposed procedures for filing and reviewing requests filed pursuant to Section 332(c)(7)(B)(iv)-(v) of the Communications Act for relief from state and local regulations on the placement, construction or modification of personal wireless service

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<sup>1</sup> In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Docket No. 97-192. Notice of Proposed Rulemaking, released August 25, 1997 ("NPRM").

facilities<sup>2</sup> based either directly or indirectly on the environmental effects of RF emissions.

SBMS agrees that it is appropriate to institute procedures for reviewing Section

332(c)(7)(B) (iv)-(v) petitions and, as described below, largely supports the

Commission's recommended procedures.

**II. THE TERMS "ACT "AND" FAILURE TO ACT" SHOULD BE  
CONSTRUED SO AS TO ENABLE PERSONAL WIRELESS PROVIDERS  
TO PETITION FOR RELIEF QUICKLY.**

Pursuant to Section 332(c)(7)(B)(v) a person adversely affected by a final action or failure to act by a State or local government may commence an action in court within 30 days.<sup>3</sup> In addition, any person adversely affected by an act or failure to act by a State or local government with respect to siting decisions based on the environmental effects of RF emissions may petition the Commission for relief.<sup>4</sup> The Commission proposes that final action for the purposes of determining when a party could petition it for relief should be defined so that a wireless provider could seek relief from the Commission from an adverse action of a local zoning board or commission while its independent appeal of that denial is pending before a local zoning board of appeals.<sup>5</sup>

SBMS supports this definition. It is axiomatic that licensees cannot compete without cell sites. Thus, it is imperative that these issues be resolved quickly.

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<sup>2</sup> 47 USC Code Section 332 (c)(7)(C) defines personal wireless services to mean commercial mobile services, unlicensed wireless services and common carrier wireless exchange access services.

<sup>3</sup> 47 US Code §332(c)(7)(B)(v).

<sup>4</sup> Id.

<sup>5</sup> NPRM, para. 137.

The Communications Act is explicit that State and local governments may not regulate on the basis of the environmental effects of RF emission. Unnecessary delays in the ability to bring these issues to the Commission for resolution would thwart the purpose of Section 332 (c)(7)(B)(iv).<sup>6</sup> Moreover, while the Communications Act specifically requires “final action” prior to commencing a proceeding in court, it only requires a party being adversely affected by “an act” prior to petitioning the Commission.<sup>7</sup> It is clear that Congress recognized that time was of the essence in these cases, and it did not intend that a party had to exhaust all administrative appeals prior to petitioning the Commission.

An official act for the purposes of this section should not be limited to site specific decisions. A regulation of general applicability that seeks to regulate any or all sites on the basis of the environmental effects of RF emissions should qualify as an official act from which a personal wireless provider can seek relief under Section 332 (c)(7)(B)(v). For example, at least one local jurisdiction passed an ordinance that gives the city the authority to require technical evaluations. The evaluation requires verification of the electromagnetic frequency needs of the applicant and identifying alternative RF coverage solutions and alternatives. The city would charge the applicant for the cost of this technical evaluation. The environmental effects of RF emissions would be part of the analysis. This is an attempt by the city to substitute its judgment for that of personal wireless provider in designing a wireless network. This is the type of

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<sup>6</sup> 47 US Code §332(c)(7)(B)(iv).

<sup>7</sup> 47 US Code §332(c)(7)(B)(v).

action or regulation regarding the placement of wireless facilities that Section 332 (c)(7)(B)(v) was designed to prevent. The Commission should make clear in its order that this type of action by a local or state government constitutes an act from which a personal wireless carrier can petition the Commission for relief.

The Commission proposes to determine whether a state or local government has “failed to act” on a case-by-case basis taking into account various factors, including how state and local governments typically process other facility siting requests and other RF-related actions.<sup>8</sup> SBMS agrees with one caveat. Moratoria should be excluded from the evaluation of what is typical processing time.

The Commission seeks comment on whether to grant relief from a final action or failure to act based only partially on the environmental effects of RF emissions.<sup>9</sup> It notes that the Conference Report states that Section 332(c)(7)(B)(iv) is intended to prevent a state or local government or its instrumentalities from basing the regulation of the placement, construction or modification of commercial mobile service facilities “directly or indirectly on the environmental effects of radio frequency emission”<sup>10</sup> The Commission proposes to examine such determinations on a case-by-case basis and to preempt, where applicable, only that portion of an action or failure to act that is based on RF emissions.<sup>11</sup> SBMS agrees with this position.

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<sup>8</sup> NPRM, para. 138.

<sup>9</sup> NPRM, para. 139.

<sup>10</sup> Id. (emphasis added in NPRM).

<sup>11</sup> NPRM, para. 139.

One example of how a decision could be indirectly based on RF emissions is where the record and the decision contain references to community opposition based on RF considerations although the decision does not explicitly cite to RF considerations as the reason for denying the permit. The Commission tentatively concludes that it will grant relief from state and local regulations of personal wireless facilities based upon concerns for the environmental effects of RF emissions, even if there is no formal justification provided for the decision, if there is evidence to support the conclusion that concerns over RF emissions constituted the basis for the regulation.<sup>12</sup> SBMS agrees. Opponents of commercial mobile radio service facilities are knowledgeable. They will advise local governments to avoid justifying a denial on RF considerations. Therefore, the Commission must guard against subterfuge. The policy should not affect the local and state jurisdictions unfairly since they have an obligation to provide their decisions in writing supported by substantial evidence contained in the written record.<sup>13</sup>

**III. SBMS SUPPORTS THE COMMISSION'S RECOMMENDATIONS WITH RESPECT TO WHAT INFORMATION PERSONAL WIRELESS PROVIDERS MUST SUBMIT TO STATE AND LOCAL GOVERNMENTS TO DEMONSTRATE COMPLIANCE WITH RF GUIDELINES.**

The Commission notes that state and local governments cannot regulate on the basis of the environmental effects of RF emissions to the extent such facilities comply with the Commission's regulations concerning such emissions.<sup>14</sup> However, the Act and the legislative history are silent with respect to what localities can request from personal

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<sup>12</sup> Id. at para. 140.

<sup>13</sup> 47 US Code §332(c)(7)(B)(iii).

<sup>14</sup> NPRM, para. 142.



wireless service providers to demonstrate compliance.<sup>15</sup> The Commission requests comment on two alternatives. Both alternatives are based on the distinction between facilities that are categorically exempt from routine Commission evaluation based on their height above ground level or their low operating power, and those that are not exempt.

The first alternative states that for personal wireless facilities that are categorically exempt from routine Commission evaluation state and local authorities would only be allowed to request that a personal wireless provider certify in writing that its proposed facility will comply with the Commission's RF emission guidelines.<sup>16</sup> With respect to facilities that are not categorically excluded, state or local authorities would be limited to requesting copies of any and all documents related to RF emissions submitted to the Commission as part of the licensing process.<sup>17</sup>

Alternative two retains the same proposal for facilities that are not categorically exempt.<sup>18</sup> However, for facilities that are categorically exempt, the Commission proposes that state and local governments be permitted to request that the personal wireless service provider submit a demonstration of compliance.<sup>19</sup>

SBMS' facilities are generally non-exempt from routine RF emission evaluation, and SBMS supports the Commission's recommendation with respect to

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<sup>15</sup> Id.

<sup>16</sup> Id. at para. 143.

<sup>17</sup> Id.

<sup>18</sup> Id. at para. 144.

<sup>19</sup> Id.

facilities that are non-exempt. It is appropriate for the Commission to limit what local authorities can request to only those documents related to RF emissions submitted as part of the licensing process. The Commission is the sole licensing authority. It is unreasonable to burden licensees with requirements over and above those of the Commission. Moreover, personal wireless providers operate in many jurisdictions. It would be unreasonable to permit each jurisdiction to establish separate requirements regarding what information must be submitted to it. Since both alternative one and alternative two treat facilities that are not categorically exempt in the same manner, SBMS supports either alternative.

**IV. ONLY PERSONAL WIRELESS PROVIDERS SHOULD BE PERMITTED TO PETITION FOR A DECLARATORY RULING.**

The Commission proposes that parties seeking relief under Section 332 (c)(7)(B)(v) file a request for declaratory ruling and that a copy be served on the state or local authority that took the action or failed to take action against which relief is sought.<sup>20</sup> SBMS supports this procedure.

Section 332(C)(7)(B)(v) allows any person “adversely affected” to file for relief.<sup>21</sup> The Commission requests comment on how to define “adversely affected” and how to determine whether an entity has standing to participate in the preemption proceeding.<sup>22</sup>

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<sup>20</sup> NPRM, para. 149.

<sup>21</sup> 47 US Code §332(c)(7)(B)(v).

<sup>22</sup> NPRM, para. 150.

Persons adversely affected should be limited to personal wireless service providers. The statute provides that any person adversely affected by an act or failure by a state or local government with respect to the placement of personal wireless facilities may petition the Commission for relief, if the action or failure to act was based on the environmental effects of RF emissions and the facilities comply with RF emission guidelines.<sup>23</sup> The only persons that fall within the confines of this rule are personal wireless providers. If the Commission fails to define persons adversely affected in this manner, it will encourage private citizens and community groups to petition the Commission with respect to zoning decisions related to RF emission issues. This was not the intent of the statute. On its face the statute was intended to ensure that state and local governments cannot regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of RF emissions to the extent that the facilities comply with the Commission's regulations concerning such emissions.<sup>24</sup> Private citizens and community groups have ample opportunity to voice their views on siting issues before local and state governments and to seek redress through the court system if need be. They should not be permitted to petition the Commission under Section 332(c)(7)(B)(v).

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<sup>23</sup> 47 US Code §332(c)(7)(B)(iv).

<sup>24</sup> Id.

**V. SBMS AGREES THAT PERSONAL WIRELESS PROVIDERS SHOULD BE PRESUMED TO BE IN COMPLIANCE WITH RF EMISSION GUIDELINES.**

The Commission proposes that when reviewing requests for relief under Section 332(c)(7)(B)(v) , personal wireless facilities providers would be presumed to be in compliance with the Commission's RF emission guidelines.<sup>25</sup> The state or local government would have the burden of overcoming this presumption. SBMS supports this approach. As the Commission acknowledges, they generally presume that licensees are in compliance with the rules, unless presented with evidence to the contrary.<sup>26</sup> For a regulator to take a contrary approach and presume non-compliance would suggest that the regulator's efforts in carrying out its responsibilities were not effective.

**VI SBMS SUPPORTS THE COMMISSION'S PROPOSAL WITH RESPECT TO THE OPERATION OF THE PRESUMPTION OF COMPLIANCE AND REBUTTAL.**

The Commission proposes that interested parties be permitted to rebut the presumption of compliance.<sup>27</sup> The Commission further proposes that presentations to rebut the presumption be limited to parties that are able to demonstrate that they are interested parties or otherwise demonstrate that they have standing to participate in the proceeding.<sup>28</sup> SBMS agrees with this proposal.

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<sup>25</sup> NPRM, para. 151.

<sup>26</sup> Id.

<sup>27</sup> NPRM, para. 153.

<sup>28</sup> Id.

The Commission proposes that interested parties provide a demonstration of non-compliance that could include an Environmental Assessment with detailed RF measurements or calculations that indicate that the Commission's RF emission guidelines for controlled or uncontrolled environments is or would be exceeded in the disputed area or a demonstration that the licensee's operation otherwise may not comply with the Commission's RF exposure guidelines.<sup>29</sup> If the interested party fails to make a prima facie case for noncompliance, the Commission would preempt the state or local regulation. If a prima facie case for noncompliance is made, the burden of proof would shift to the personal wireless provider to demonstrate that the facility would comply with RF limits.<sup>30</sup> SBMS supports this procedure. The procedure is consistent with the justifiable presumption that licensees are in compliance with all laws and rules.

**VII. ONLY PERSONAL WIRELESS PROVIDERS AND LOCAL AND STATE GOVERNMENTS SHOULD BE PERMITTED TO SEEK REVIEW OF THE COMMISSION'S DECISION WITH RESPECT TO A PETITION FOR DECLARATORY RULING.**

The Commission proposes that both the wireless provider and the interested parties be permitted to seek review of final Commission and delegated authority actions taken pursuant to Section 332(c)(7)(B)(v) via the Commission's review procedures.<sup>31</sup> SBMS has no objection with having interested parties such as community groups have the ability to submit evidence to demonstrate noncompliance. However, with respect to seeking review of the Commission's decision, only the wireless service

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<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

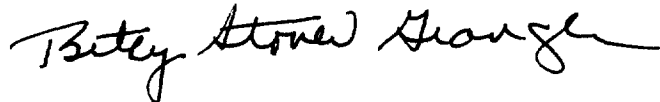
provider and the state or local government should have that option. If the state or local government accepts a Commission's decision that the personal wireless provider is in compliance with the RF emission guidelines, the matter should end. Community groups or private individuals should not have the opportunity to seek review of a decision that the state or local government accepts.

#### **VIII. CONCLUSION.**

The NPRM proposes procedures to review requests from state and local regulations based on the effects of RF emissions filed pursuant to Section 332(c)(7)(B)(vi) of the Communications Act. With some minor differences noted in the foregoing, SBMS supports the Commission's recommendations. The speedy resolution of siting disputes is critical to deployment of personal wireless services. The NPRM

provides a balanced approach to resolving disputes based on RF emission compliance considerations. SBMS respectfully requests that the Commission finalize the procedures and issue new rules as soon as possible.

Respectfully submitted,

A handwritten signature in black ink, reading "Betsy Stover Granger". The signature is fluid and cursive, with the first name "Betsy" being the most prominent.

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